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President

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Dear Representative:

We understand that efforts are underway to bring H.J. Res. 56, the Federal Marriage Amendment, to the House floor for a vote during the next few weeks. While we have taken no position either favoring or opposing laws that would allow same-sex couples to enter into civil marriages, the American Bar Association is staunchly opposed to this proposed amendment. Regardless of your personal views on same-sex marriage, we urge you to reject this attempt to use the constitutional amendment process to impose on the states a particular moral viewpoint about a controversial issue and to vote against the proposed amendment, which tramples on the traditional authority of each state to establish its own laws governing civil marriage.

The authority to regulate marriage and other family-related matters has resided with the states since the founding of our country and is rooted in principles of federalism. This has enabled states to enact diverse marriage laws that respect and reflect the unique needs and views of their residents. Our federal system also gives states the authority to adopt their own state constitutions and to interpret its provisions to accord greater protection to individual rights than are granted under similar provisions of the U.S. Constitution. Over the years, we not only have successfully tolerated the fact that state laws and judicial interpretations governing marriage are not uniform, we have benefited from it. As the late Justice Louis Brandeis famously explained many years ago:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social experiments without risk to the rest of the country.

Variations among the states laws governing same-sex unions have provided the opportunity to examine the effect different laws have on society, increased each state's exposure to new ideas, and served as guidance to those states that seek to modify their laws. Adoption of H.J. Res. 56 would deprive the nation of these benefits.

While the proposed amendment is far too vague to ascertain its full meaning with certainty, its adoption would have sweeping consequences for the states that extend well beyond invalidating

or prohibiting same-sex civil marriages. For instance, it would forever prohibit a state from adopting its own constitutional amendment to establish civil unions or extending to unmarried couples—heterosexual or gay – legal protections, such as health insurance, that the state provides to married spouses if the state constitutions so require, as in Vermont. And, despite the claims of the resolution’s authors, it is unclear whether a state would be prohibited from passing laws permitting civil unions or domestic partnerships and providing state-conferred benefits to the couples involved. There is little doubt, however, that the joint resolution’s lack of clarity will result in extensive litigation and that its passage and adoption will limit the future ability of states to fashion their own responses to meet the changing needs of their residents.

H.J. Res. 56 also should be opposed because a constitutional amendment is neither a necessary nor appropriate vehicle for changing our civil marriage laws. The Constitution should not be amended absent urgent and compelling circumstances, and it certainly should not be amended to call a halt to democratic debate within the states or to promote a particular ideology. As Bob Barr, former U.S. Representative from Georgia, succinctly stated in testimony before the Senate Judiciary Committee this past spring, “We meddle with the Constitution to our own peril. If we begin to treat the Constitution as our personal sandbox, in which to build and destroy castles as we please, we risk diluting the grandeur of having a Constitution in the first place.”

It particularly does not make sense for the House to pursue the Family Marriage Amendment during these busy, final weeks of the 108th Congress since there is no urgent need for immediate action and, clearly, no national consensus has emerged over the legal ramifications of same-sex unions. Indeed, Congress, through enactment of the Defense of Marriage Act in 1996, has already denied same-sex couples the more than 1,000 federal benefits that extend to heterosexual married couples and relieved states of their obligation to accord full faith and credit to same-sex marriages sanctioned by other jurisdictions. Therefore, this proposed amendment would only affect state laws governing marriage and same-sex unions and attending judicial interpretations. During your deliberations over the next week, we hope you will not lose sight of the fact that, at present, 49 states grant civil marriage licenses exclusively to heterosexual couples. Clearly, this nation is not facing a crisis of constitutional proportions that requires a drastic and immediate solution.

The ABA Section of Family Law recently released a white paper titled ***An Analysis Of The Law Regarding Same-Sex Marriage, Civil Unions And Domestic Partnership***, which is available on our website at: <http://www.abanet.org/family/whitepaper/fullreport.pdf> . (Printed copies may be obtained by emailing Denise Cardman, Senior Legislative Counsel in our Governmental Affairs Office, at cardmand@staff.abanet.org .) This thorough compilation of activity within the 50 states amply demonstrates that courts and legislatures already have enacted or issued hundreds of statutes, local ordinances and court opinions to address the myriad complex issues and ramifications arising from this relatively new public policy debate and are continuing to address the issues vigorously. We hope that the report will help you in your review of this proposed amendment..

Allowing the states to craft their own solutions in this area requires both confidence and humility: confidence in the wisdom of the people and their representatives, and humility to understand, in the words of the late Judge Learned Hand, that “[t]he spirit of liberty is the spirit

that is not too sure that it is right.” If the Constitution is to continue to embody the spirit of liberty for future generations, we must not seek to use it to enshrine still-evolving societal views.

Despite the fact that more than 11,000 proposed constitutional amendments have been introduced in Congress since 1789, the Constitution has been amended only 27 times in 215 years -- a testament to its vitality and to Congressional restraint. We urge you to exercise the same restraint today and oppose H.J. Res. 56.

Sincerely,

A handwritten signature in black ink, reading "Robert J. Grey, Jr." with a stylized, cursive script.

Robert J. Grey, Jr.